SCORE INTERNATIONAL

IBLA 83-762 Decided December 29, 1983

Appeal from determination by Havasu Arizona Resource Area Manager, Bureau of Land Management, setting fees for the 1983 SCORE-Parker 400 desert race. Y-0436.

Affirmed.

1. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

   Notice of appeal must be filed within 30 days from the date that the party appealing receives the decision from which the appeal is taken. A timely filing of the notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal.

2. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Statement of Reasons

   A statement of reasons in support of an appeal which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. However, dismissal is not mandatory and each case will be considered on its own merits.

3. Federal Land Policy and Management Act of 1976: Permits -- Public Lands: Special Use Permits -- Special Use Permits: Generally

   Use fees for special recreation use permits for competitive use in areas other than developed recreational sites are calculated pursuant to 43 CFR 8372.4(b)(2). This section provides for a use fee of 5 percent of the gross receipts (with certain minimums). However, there is no definition of the term "gross receipts" in the pertinent regulations or enabling legislation. Therefore, if a permittee appeals from a determination of

> the use fee owing under a special recreation use permit, the permittee must ordinarily demonstrate that: (1) The fee calculation contained mathematical errors or errors with respect to the amount, in fact, received (2) the fee calculation was made using a formula which differed from that specifically agreed upon or contained in the permit; or (3) the fee calculation was not the same as had been previously applied to the permit and the permittee had no reason to believe that the formula would not be the same.

APPEARANCES: Salvatore Fish, President, Score International, for appellant; Lawrence A. McHenry, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Score International (Score) has appealed from a May 10, 1983, determination by the Havasu, Arizona, Resource Area Manager, Bureau of Land Management (BLM), recalculating the fee assessed pursuant to a special recreation permit (permit) issued by BLM on January 26, 1983.

Departmental counsel has filed a motion to dismiss contending that neither appellant's notice of appeal nor its statement of reasons was timely filed. The motion is based on the argument that the decision actually under appeal is the permit issued appellant in January 1983, not the subsequent document assessing fees therefor. It is also contended that appellant's statement of reasons fails to show error in BLM's assessment of fees for the 1983 event.

On May 17, 1982, appellant filed a "Special Recreation Application and Permit, Form 6260-5" with the BLM District Office, Yuma, Arizona, together with the $10 filing fee. In the application appellant applied for a permit to conduct an off-road vehicle race in each of the years, 1983, 1984, and 1985. Parts 15a and 17 of the application as filed are pertinent to this appeal and read as follows:

> 15a. Give fee for participating -- $420 4-wheel: 285 other
>
> 17. If cash prizes, or equivalent, are awarded, list -- 50% of the entry fee plus cost of trophies.

Subsequent to filing the application the representatives of Score and BLM corresponded and met on a number of occasions to discuss the details of proposed stipulations, the manner in which the race would be conducted, the rehabilitation requirements, and the assessment of a fee for the issuance of the permit. Following these meetings and exchanges of letters, on January 14, 1983, a final form permit with 51 stipulations attached was sent to Score. This permit form was for the race to be held on February 6-7, 1983, only, as it was determined that Score must file a separate application for each of the races proposed. This permit was executed by the president of Score on

January 17, 1983, and returned with additional documents BLM requested in its January 14, 1983, cover letter. The permit was signed and issued by BLM on January 26, 1983. The language of parts 15a and 17 as found on the executed copy of the permit read as follows:

> 15a. Give fees for participating -- $225 4-wheel; $150 other
>
> 17. If cash prizes, or equivalent, are awarded, list -- Purse fund plus cost of trophies.

The cover letter sent by BLM when forwarding the permit forms to Score contained the following language: "Your signature indicates that you have reviewed the application for completeness and agree to all of the conditions contained therein, including the 51 stipulations on Attachment A." Stipulation 51 is pertinent to the issue in this case. This stipulation states: "Fee calculation will be based on a flat 5% of gross SCORE receipts, unaffected by mileage adjustments for Federal, State and private land."

On March 7, 1983, a month after the race, appellant submitted Government form GPO 837-057 entitled "Post Use Questionnaire." On the questionnaire, appellant indicated that there had been 352 participants, that fees charged had been "$225/150 participant," and that the gross receipts totaled $74,837. In response thereto, the BLM Area Manager wrote appellant as follows on March 14, 1983:

> There are two problems with the 1983 Post-Use Questionnaire. One, the number of participants was not broken out by the number of participants paying each fee level, e.g. the number of motorcycles paying the motorcycle fee. Two, there appears to be a significant discrepancy between the fee levels you listed on the Post-Use Questionnaire and information we have on the actual fees charged per participant. We would appreciate your explanation and/or correction of these matters.

Appellant explained by letter of March 23, 1983, that there were 264 four-wheel vehicles at $225 and 88 two- and three-wheel vehicles at $150. Appellant's letter included the following calculation and statement:

264 at $225	$594.00
88 at $150	132.00
Sale of Maps, Programs, Etc.	2237.00
	$74,837.00

> To explain the variance in fee levels, a 4-wheel entrant pays $450, $225 of which is the entry fee and $225 the purse contribution, and similarly 2- and 3-wheel entrants pay $300, $150 of which is the entry fee and $150 the purse contribution. The purse contribution is a liability of SCORE when received and cannot be construed as gross income.

On May 10, 1983, a meeting was held between the Area Manager and Salvatore Fish, President, Score International, at resource area headquarters. According to the Area Manager's memorandum to the record, the purpose of the meeting was to "discuss required grading and possible misunderstandings regarding the permit fee."

On the day of the meeting, May 10, 1983, the Area Manager wrote appellant a letter stating in pertinent part:

> I believe we cleared up what may have been mutual misunderstandings regarding the fee calculation process.
>
> As per your March 23, 1983 letter you reported 264 4-wheel contestants and 88 2 and 3-wheeled contestants. At fees of $450 and $300 respectively, this works out to $145,200.00 gross revenue, as detailed below:
>
> 264 @ $450.00 = $118,800.00
> 88 @ $300.00 = 26,400.00
> Total $145,200.00
>
> The permit for the event stipulated a 5% fee which works out to $7,260.00. Unlike previous years, no advance payment was required for the 1983 event, so this will be the full amount payable to the Bureau of Land Management.

Under date of May 25, 1983, appellant wrote the Area Manager acknowledging receipt of the latter's May 10 letter. The appellant's letter states in pertinent part:

> This letter constitutes a Notice of Appeal regarding the assessment of fees for the 1983 Pernod/SCORE Parker 400. Within 30 days, our complete statement of the reasons we are appealing will be filed with the United States Department of the Interior, Office of the Secretary, Board of Land Appeals, 4015 Wilson Boulevard, Arlington, Virginia, 22203.

The notice of appeal was received in the BLM resource area office on May 27, 1983. Appellant's statement of reasons was received in the offices of the Board on June 27, 1983.

As indicated at the outset, it is BLM's position that the decision appealed herein is not the Area Manager's May 10, 1983, letter, but the permit approved by BLM, and received by appellant sometime after January 27, 1983, prior to the race. BLM contends that appellant acquiesced in the decision for a prolonged period of time and took no appeal therefrom. Accordingly, BLM argues that the notice of appeal and statement of reasons were untimely filed.

Score has stated two objections to BLM's method of calculating the special use permit fee. The first objection is to the definition of gross receipts. Score states: "Score International takes the position that gross receipts should not include the amount of 50% of the entry fee that constitutes a liability on the part of SCORE to establish that payroll fund which was paid by the entrants to be held in trust by SCORE International." The record discloses that a portion of the entry fee was used for a purse which was paid to the race winners. It is our interpretation that Score intended this amount to be excluded from the "gross receipts" prior to the calculation of the special use permit fee. The second objection is to the change of BLM policy which had previously allowed a reduction of the fee based upon the percentage of the total racecourse which was on lands administered or owned by parties other than BLM (state and private lands). The record further shows that 61 percent of the racecourse was on BLM lands. The record discloses that until the 1983 race the gross income had been reduced by 39 percent prior to the calculation of the fee.

[1] BLM's motion to dismiss is based in part on the theory that since appellant failed to challenge the fee calculation method set forth in stipulation 51, appended to the permit, it deprived itself of the opportunity to appeal any actual subsequent assessment made pursuant to that stipulation. The motion is well founded with respect to appellant's objection to BLM's change in policy regarding the pro rata reduction of the use fee based on the percentage of the racecourse located on BLM land. The provisions of stipulation 51 are clear and not subject to two interpretations. In fact the report filed by Score on February 24, 1983, and subsequently explained in the March 23, 1983, letter from Score indicated that there was no question of Score's proper interpretation of the intent of stipulation 51. The Score letter of March 23, 1983, stated:

> To explain the variance in fee levels, a 4-wheel entrant pays $450, $225 of which is the entry fee and $225 the purse contribution, and similarly 2- and 3-wheel entrants pay $300, $150 of which is the entry fee and $150 the purse contribution. The purse contribution is a liability of Score when received and cannot be construed as gross income.

Score made no deduction based on the portion of the racecourse not on Federal land.

A notice of appeal must be filed within 30 days from the date that the party appealing receives the decision from which the appeal is taken. A timely filing of the notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal. Ina May Collier Johnson, 72 IBLA 26 (1983). Appellant received final notice that the fee calculations would be based on a flat fee 5 percent of gross Score receipts, unaffected by mileage adjustments for Federal, state, and private lands on January 17, 1983. The time for appeal from this decision expired on February 16, 1983. No appeal was made until May 25, 1983.

With respect to the first basis for the Score appeal the BLM motion is flawed. This motion assumed that the BLM assessment of a fee cannot be challenged as long as the fee is calculated in accordance with stipulation 51. It ignores the possibility that the BLM calculation might contain mathematical errors or be improper for some reason not apparent from the face of the permit. Appellant could not have been placed on notice to appeal a fee calculation which had not been made. The term "gross receipts" is not defined in the permit. On May 10, 1983, the Area Manager made a calculation of the fee due and notified Score of his determination. We consider this letter to be a final BLM decision and an appeal from that determination, made within 30 days from the date of receipt of that determination would be timely. The Score appeal was made within the 30-day period.

[2] BLM's motion to dismiss is also based on the argument that the statement of reasons fails to demonstrate error in the BLM action. It is true that a statement of reasons which does not point out in what respect the decision appealed from is in error, renders the appeal subject to dismissal. However, dismissal is not mandatory and each case may be considered on its merits. Geneva Barry, 58 IBLA 48 (1981). We find the record of the case contains sufficient evidence of confusion with respect to the manner of determination of the gross receipts to justify review of the BLM actions. Therefore, the motion to dismiss is denied with respect to the appellant's first contention.

[3] Three categories of income made up the receipts from the race. These categories are the entry fee, the purse monies paid by the entrants and monies received from the sale of maps, programs, etc. The question is: Which of these categories is to be included as a part of "gross receipts"? Score has included the entry fees and the monies received from the sale of maps, programs, etc., but excluded the purse. BLM's calculation includes the entry fee and the purse but excludes the monies received from the sale of maps, programs, etc.

Appellant contends that the "purse" is not a part of the gross receipts. The basis for this contention is that the portion of the entry fee which was to be awarded as prize money was a liability the moment it was paid and that Score merely acted as a trustee for the collection and distribution of the prize money. The fee for the issuance of the special use permit is set by the provisions of 43 CFR 8372.4(b)(2). This section states: "(2) Competitive use -- the fee is 5 percent of the gross receipts, $1 per participant per day or $10 whichever is greater. When use is both commercial and competitive, the competitive fee shall be charged." There is no definition for the term "gross receipts" in the pertinent regulations, and the comments printed in the Federal Register when the regulations were promulgated 1/ are silent with respect to what was contemplated by the term "gross receipts."

We are not aided by our research of cases defining the term "gross receipts," as there are cases which have found that certain receipts can,

1/ See 42 FR 5294 (Jan. 27, 1977); 43 FR 7868 (Jan. 24, 1978).

under certain circumstances, be deducted prior to the calculation of a fee based on gross receipts, 2/ and cases which have found that the deduction of similar items is not allowable. 3/

This problem could have been avoided by including a stipulation more clearly defining "gross receipts." However, the use permit is also silent with respect to the definition of "gross receipts," other than the statement in stipulation 51 that the fee would be calculated without adjustment for Federal, state, and private land.

The change in the provisions of items 15a and 17 of the permit between the date that the application was filed and the date that it was executed could give rise to the argument that the change was made to reflect the understanding that the prize purse was to be treated in a different manner when calculating the use fee for the 1983 event. Neither appellant nor BLM has offered any evidence as to why or when this change took place. Without some explanation of this change, we must assume that the change was made to more accurately reflect the split between the portion of the entry fee which was to be retained by Score and that portion which would be awarded as prize money. Without proof, we cannot assume that the change reflects an understanding between the parties that the prize purse would be deducted prior to the calculation of the use fee.

Internal memoranda between BLM officials clearly indicate that the intent of BLM was to include the purse amount as a part of the "gross receipts." A memorandum written subsequent to the race also indicated that the matter was discussed with the race officials after the date of the race. However, this discussion does not reflect the understanding (or misunderstanding) of the parties at the time that the special use permit was executed. The turning point for our determination is the lack of evidence in the record which would indicate that in previous use fee calculations the purse had been excluded from the gross revenues prior to the calculation of the use fee. Score has submitted no evidence that the purse had ever been excluded when making use fee calculations for previous permits. On the other hand, BLM has submitted a letter to the National Off-Road Racing Association written in 1974. This letter gives a definition of the term "gross receipts" as follows: "The permittee must pay the United States a recreation use fee of 5% of gross receipts of the event (income from the operation of the event before deducting costs such as prizes, taxes, insurance, etc.; and to include income from participant and spectator fees, food and beverage concessions, etc) * * *." (Emphasis added.)

There is nothing in the record which would indicate that it had been BLM's policy to allow a deduction of the prize purse prior to the calculation of the 5 percent use fee in previous use permit calculations. Without this showing there is no basis for the conclusion that the calculation is in variance with BLM's past practice. For the same reason, we will accept BLM's

2/ See Laclede Gas Co. v. City of Saint Louis, 253 S.W.2d 832 (Mo. 1953). 3/ See Pacific Greyhound Lines v. Johnson, 129 P.2d 32 (Cal. 1942).

calculation of the use fee after deducting the amount received from the sale of maps, programs, etc. While it could logically be argued that this amount should also be included, neither appellant nor BLM has raised issue with this deduction. Therefore, the gross receipts are $154,200, as calculated in the March 10, 1983, letter by BLM. On this basis, the use fee is $7,260.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge
Alternate Member

C. Randall Grant, Jr.
Administrative Judge